IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

83-5897

NO. 80-

CARL ELSON SHRINER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT ORF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE STATE "SCRUPULOUSLY HONORED" PETITIONER'S FIFTH AMENDMENT RIGHT TO CUT OFF QUESTIONING, WHERE, AFTER APPROXIMATELY EIGHT HOURS OF INTERROGATION, PETITIONER REQUESTED NO FURTHER QUESTIONING AND THE INTERROGATION MERELY STOPPED FOR A "MINUTE OR TWO" AND THEN RESUMED WITHOUT ANY ADDITIONAL MIRANDA WARNINGS OR WAIVER?

2. WHETHER THE TESTIMONY OF A PRIEST WHO HAD WITNESSED AN EXECUTION BY ELECTROCUTION SHOULD HAVE BEEN PRECLUDED FROM THE JURY AS IT DENIED PETITIONER THE BENEFIT OF THE JUDGMENT OF THE COMMUNITY IN VIOLATION OF THE EIGHTH AMENDMENT?

3. DOES THE CONSIDERATION OF NONSTATUTORY AGGRAVATING FACTORS IN IMPOSING A SENTENCE OF DEATH CONFLICT WITH THE RELIABILITY REQUIRED FOR CAPITAL SENTENCING BY THE EIGHTH AND FOURTEENTH AMENDMENTS?

4. DID THE ELEVENTH CIRCUIT ERR IN UPHOLDING JURY INSTRUCTIONS THAT A REASONABLE JUROR MIGHT WELL HAVE UNDERSTOOD TO PRECLUDE CONSIDERATION OF NONSTATUTORY MITIGATING CIRCUMSTANCES THROUGH:

(i) A DISREGARD OF SANDSTROM V. MONTANA, 442 U.S. 510 (1979), THUS CREATING A CONFLICT WITH THE FIFTH CIRCUIT'S CONDEMNATION OF IDENTICAL JURY INSTRUCTIONS IN WASHINGTON V. WATKINS, 665 F.2D 1346 (5TH CIR. 1981), CERT. DENIED, 456 U.S. 949 (1982); AND

(ii) A FAILURE TO RECOGNIZE THAT INSTRUCTIONAL ERROR UNDER LOCKETT V. OHIO, 438 U.S. 586 (1978), INFECTS A CAPITAL SENTENCING TRIAL WITH PREJUDICE SUFFICIENT TO SATISFY THE REQUIREMENTS OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), AND UNITED STATES V. FRADY, 456 U.S. 152 (1982)?

5. DOES THE FAILURE OF THE SENTENCING COURT TO SET FORTH MITIGATING FACTORS IT FOUND, DEPRIVE A DEFENDANT OF THE RIGHT TO MEANINGFUL REVIEW?

6. DOES THE FLORIDA SUPREME COURT'S SYSTEMATIC, SECRET, EX PARTE SOLICITATION AND CONSIDERATION OF EXTRA-RECORD, PRISON-GENERATED PSYCHOLOGICAL EVALUATIONS

QUESTIONS PRESENTED
CONTINUED

AND SIMILAR MATERIALS OF QUESTIONABLE RELIABILITY CONCERNING CAPITAL APPELLANTS IN CASES PENDING BEFORE IT FOR SENTENCING REVIEW VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-

CARL ELSON SHRINER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent, Louie L. Wainwright, prays that the Petitioner's Petition for Writ of Certiorari be denied.

PREFACE

Respondent accepts Petitioner's Citations To Opinions Below, Jurisdiction and Constitutional and Statutory Provisions Involved found on pages 1-2 of Petitioner's petition.

In accepting Petitioner's jurisdictional statement Respondent does not concede any merit to the issues raised but rather acknowledges Petitioner's authorization to proceed with said pleadings.

STATEMENT OF THE CASE

The Statement of the Case provided by Petitioner is unacceptable in that the statement is argumentative and therefore inappropriate.

The facts and statement of the case as set out in Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983) rehearing denied November 4, 1983 provide an excellent recital of those facts and circumstances germane to the issues before this court. (See Petitioner's Appendix Shriner v. Wainwright, supra):

> Convicted of first degree murder and sentenced to death, Carl Elson Shriner appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C.A. §2254. Shriner seeks relief from his conviction on the grounds that the trial court improperly admitted into evidence a confession and evidence a confession and evidence of other crimes. He attacks his sentence on the grounds that the trial court excluded proffered testimony of a clergyman as to electrocutions, the so-called Florida Brown issue, and the improper consideration of a nonstatutory aggravating circumstance. We affirm.
>
> The facts that led to Shriner's conviction and sentence are chronicled in some detail in Shriner v. State, 386 So.2d 525, 527-28 (Fla. 1980). We briefly outline them here. At 6:15 a.m. on October 22, 1976, James Grills entered a Majik Market in Gainesville, Florida and discovered the dead body of Judith Carter, the store clerk. Carter had been shot five times, and the

Majik Market apparently had been robbed. Police, summoned to the scene, learned from two women who were the last known customers to enter the store that a young male patron had remained in the Majik Market after they left at approximately 1:30 a.m. earlier that day. Ninety minutes after the women had left the store, a young man with a hand gun had robbed a motel in Gainesville. Based on information provided by the motel clerk and the two women, the police prepared two composite sketches and a written description of a single suspect.

The following afternoon an Alachua County deputy sheriff stopped a car in which the passenger, Shriner, resembled the suspect's description. After advising Shriner of his Miranda rights and briefly questioning him, the deputy took Shriner down to the sheriff's office, where questioning continued with Shriner's apparent permission following another set of Miranda warnings. Shriner and the couple in whose home he lived consented to a search of the premises where the police discovered a revolver. When a law enforcement officers matched the gun to projectiles found in the Majak Market, they took Shriner to the Gainesville Police Department.

After Shriner signed a written waiver following further Miranda warnings, questioning began at 9:00 p.m. on October 23. Shriner initially confessed to only the motel robbery and gave inconsistent statements about his involvement in the murder. At 2:00 a.m., however, he finally confessed to the murder.

An Alachua County jury found Shriner guilty of first degree murder and unanimously recommended the death penalty. The trial judge followed the jury's recommendation. On direct appeal, the Florida Supreme Court upheld both the conviction and sentence, Shriner v. State, 386 So.2d 525 (Fla. 1980), and the United States Supreme Court denied Shriner's petition for certiorari. Shriner v. State, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed. 2d 829 (1981).

Shriner then filed a petition for habeas corpus in federal district court. When the district court

denied relief in an unpublished opinion, Shriner appealed to this Court.

Additional facts found in Shriner v. State, 386 So.2d 525, 527-528 (Fla. 1980) present further details of the historical events. (See Respondent's Appendix I).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

Petitioner first contends the Eleventh Circuit in Shriner v. Wainwright, supra, erroneously concluded that his rights were "scrupulously honored" pursuant to the Fifth Amendment and this Court's opinions in Miranda v. Arizona, 348 U.S. 436 (1966) and Michigan v. Mosley, 423 U.S. 96 (1979).

Initially, it is important to note that this identical issue was raised by Petitioner in his first Petition for Writ of Certiorari To the Supreme Court of Florida in Shriner v. State, 449 U.S. 1103 (1981). Petitioner has presented nothing new or demonstrated that the law has significantly changed warranting reconsideration of this matter by this Court.

The Eleventh Circuit in addressing this claim noted:

> Shriner challenges the admission at trial of his confession on three grounds. First, he argues the police lacked probable cause to take him into custody and, therefore, the confession is the fruit of an unlawful detention. Second, he claims the police did not "scrupulously honor" his right to cut

> off questioning, thus violating his Miranda rights. Third, he asserts that under the "totality of circumstances," including the allegedly inordinate length of questioning, his statements were coerced and involuntary.

The Court first concluded that the historical facts discerned by the state trial court that the police officers had probable cause to arrest Petitioner were entitled to a presumption of correctness pursuant to 28 U.S.C.A. 2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981). The Court observed that Chambers v. Maroney, 399 U.S. 42 (1970) controlled and that reliance on Dunaway v. New York, 442 U.S. 200 (1979) was misplaced.

Next the Eleventh Circuit held:

> Although Shriner argues that, prior to his confession, he requested all questioning to cease, the state attorney who asked the questions testified at both the suppression hearing and at trial that he thought Shriner wanted questioning to terminate only in relation to the robbery. Significantly, Shriner offered no rebuttal testimony. Crediting the testimony of the government attorney, the state courts found that Shriner merely wanted to limit the subject matter, not end all questioning. Shriner v. State, 386 So.2d at 532. The record "fairly support[s]" this factual determination. 28 U.S.C.A. §2254(d)(8).
>
> Given that fact, the state attorney could continue to ask Shriner questions about the murder without providing further Miranda warnings. In United States v. Vasquez, 476 F.2d 730 (5th Cir.), cert.denied, 414 U.S. 836, 94 S.Ct. 181, 38 L.Ed.2d 72 (1973), the former Fifth Circuit denied the suppression of inculpatory statements made to government agents where the defendant, suspected of possessing an unregistered firearm, told police he did not want to discuss a shooting but agreed to answer questions about the rifle itself.

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.

476 F.2d at 732-33 (footnote omitted). The Supreme Court has likewise indicated that the police do not in all circumstances have to cease all questioning once a suspect in any way exercises his Miranda rights.

> [Nothing] in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 325-26, 46 L.Ed.2d 313 (1975)(footnote omitted). The test is whether the state "scrupulously honored" defendant's right to cut off questioning. Id. at 104, 96 S.Ct. at 326 (quoting Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Here, the state complied fully with Shriner's only request: to terminate questioning as to the robbery. In short, the government "scrupulously honored" the only right Shriner exercised.

Shriner v. Wainwright, 715 F.2d at 1455.

Lastly, the court reviewed Petitioner's argument that the inculpatory statements were coerced or involuntary and concluded that said statements were not coerced and voluntarily made. See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

II

Petitioner next contends the Eleventh Circuit erred in not reversing due to the State's failure to allow him to present evidence of "evolving standards of decency" through the excluded testimony of a clergyman who had witnessed a number of executions. Specifically Petitioner argues this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978) was violated at the penalty phase of his trial due to the alleged limitation concerning mitigating evidence.

The Court finding no Lockett violation held:

> Shriner claims that the trial court, by precluding a Methodist minister from testifying about the three electrocutions he witnessed, denied the jury evidence relevant to "evolving standards of decency," in contravention of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Shriner misreads Lockett. While the plurality opinion indicated that a defendant in a capital case must be permitted to introduce virtually any evidence relating to his character, record or offense, it did not hold that all evidence proffered by the defendant concerning the propriety of electrocutions in general must be admitted. Rather, the plurality explicitly admonished:
>
> > Nothing in his opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.
>
> Id. at 604 n. 12, 98 S.Ct. at 2965 n. 12. The exclusion, on relevancy grounds, of the minister's proffered testimony, which did not at all concern Shriner's background or the crime committed, did not violate Lockett.
>
> Shriner v. Wainwright, 715 F.2d at 1456.

Moreover, while the evolving standards of decency may in a specific case be considered relevant mitigating evidence, in the instant case neither a showing that said evidence was relevant nor the actual proffer of what Reverend Gene Parks would testify to would support the admission of said evidence before the jury.

III

Petitioner argues that the improper consideration of non-statutory aggravating circumstances requires further review by this Court. Recognizing the importance of Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983), Petitioner argues the factual distinction of that case to his makes Barclay inapplicable. Respondent would submit Barclay is controlling in that matters concerning whether the trial court improperly considered non-statutory aggravating are State law questions which do not rise to a level of a constitutional violation.

> The United States Supreme Court has twice this term upheld a death sentence even though the sentencer considered an invalid aggravating circumstance. Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Barclay is particularly on point. That case, like this one, involved the alleged consideration by a state trial judge, applying the Florida death penalty statute, of a nonstatutory aggravating factor. As in Barclay, the sentencing judge here found no mitigating circumstances and some proper aggravating circumstances. He did not consider as aggravating any constitutionally protected conduct.
>
> In upholding the sentence in Barclay, the United State Supreme treated the consideration of the nonstatutory factor as purely a

matter of state law, indicating that a death sentence may be constitutional despite being based on both statutory and nonstatutory aggravating factors.

* * *

In the present case, the Florida Supreme Court viewed any error as harmless. It reasoned that even if the trial judge did improperly consider Shriner's prison record in aggravation, he would have reached the same result anyway because two legitimate statutory aggravating factors existed without any mitigating factors to counterbalance them. Shriner v. State, 386 So.2d at 534. In light of Barclay, this Court cannot overturn this harmless error determination. If anything, Barclay presented a stronger case for holding the death penalty arbitrary because there, unlike here, the jury recommended a life sentence.

The Florida courts satisfied the constitutional requirement to make an "individualized determination on the basis of the character of the individual and the circumstances of the crime." Barclay, ___U.S. at____, 103 S.Ct. at 3428 (quoting Zant v. Stephens, __U.S.___,____, 103 S.Ct. 2733, 2944, 77 L.Ed.2d 235, 251 (1983)). The state trial judge reviewed presentence reports regarding Shriner, and the one allegedly improper factor considered by the judge involved Shriner's record.

Shriner v. Wainwright, 715 F.2d at 1458-1459.

IV

Petitioner next argues relief should be granted because "at the time of the trial, Florida law limited consideration to statutory mitigating circumstances. . ." Petitioner acknowledges that no objection was raised concerning the instructions that were provided but argues that inspite of Wainwright v. Sykes, 433 U.S. 72 (1977) or United States v. Frady, 456 U.S. 152 (1982), the procedural default rule

should not apply and no cause and actual prejudice should have to be demonstrated.

> As to the jury, Shriner argues that the trial judge, by not expressly informing the jury it could consider nonstatutory mitigating circumstances, left the jury with the contrary impression. The jury instruction on aggravating and mitigating circumstances went, in pertinent part, as follows:
>
> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence [whereupon the court read the aggravating circumstances in the statutory language].
>
> The mitigating circumstances you may consider, established by the evidence, are as follows [whereupon the court read the mitigating circumstances in the statutory language].
>
> Shriner neither objected to the instruction at trial nor raised the point on direct appeal. This procedural default precludes federal habeas review on this issue unless excused for cause and prejudice. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). We need not decide whether cause exists because Shriner has not established actual prejudice as required by United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982).
>
> First, Shriner himself asked the jury to show no mercy and to sentence him to death. Accordingly, his lawyer did not argue to the jury any mitigating circumstances specific to Shriner. Given this situation, Shriner cannot attribute the jury's recommendation of death to the jury instruction. Second, the jury instruction is quite similar to that in Ford v. Strickland, 696 F.2d at 811-12, where we found insufficient prejudice to excuse the procedural default.
>
> After the jury recommended death, Shriner did an about-face, asking the judge for life and arguing what he felt were mitigating circumstances. Shriner argues that the

> judges sentencing order indicates he did not consider nonstatutory mitigating factors.
>
> There is no indication in the record or briefs that Shriner raised this issue on his direct appeal. The Florida Supreme Court's opinion in the appeal nowhere mentions the issue. The failure to raise an issue on appeal, no less than at trial, may amount to a waiver of the point in a federal habeas proceeding. See, e.g., Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977).
>
> * * *
>
> It appears clear to us that the trial judge and the Florida Supreme Court considered everything in determining whether a life sentence would be more appropriate than a death sentence, given the statutory base for capital punishment. That the Florida courts found the evidence of mitigating circumstances unpersuasive does not mean they improperly ignored it, but rather signifies they performed their task to weigh the evidence. Cf. Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982)("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence.") There is nothing in this record to indicate that either the trial or appellate court thought any allegedly mitigating evidence could not be considered in the sentencing process.
>
> Shriner v. Wainwright, 715 F.2d at 1457-1458.

See also Shriner v. State, 386 So.2d 525 at 534.

Where as here, Petitioner cannot satisfy the cause and actual prejudice requirements of Wainwright v. Sykes, supra, Petitioner has not and cannot assert entitlement to relief where the Eleventh Circuit similarly concluded no relief was warranted. See also Wainwright v. Goode, 34 Crim.L. 4101 (November 28, 1983 Case No. 83-131).

Petitioner contends that reversal is required because the "sentencing court's order failed to set forth findings of fact with regard to the mitigating circumstances he found to exist." Respondent would submit Petitioner's assertion is groundless for at least two reasons.

First, this specific issue has never been raised before either in a state or federal court. Pursuant to Cardinale v. Louisiana, 394 U.S. 437 (1969) the matter is not properly before the court.

Second, assuming arguendo that the issue is reviewable, the State trial court's findings of aggravating and mitigating circumstances for the imposition of the death penalty reveal the court found no mitigating circumstances. In Shriner v. State, 386 So.2d at 533-534 the court opined:

> The court finds, with the possible exception of number six above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the pre-sentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this defendant prior to trial, he had been diagnosed as a "psychopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacities diminish thereby.
>
> The court finds that the aggravating circumstances far outweigh the mitigating circumstances.
>
> In addition, an examination of the pre-sentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the defense, prior to sentencing, indicates that during the defendant's incarceration at the Department of Offender

> Rehabilitation, he has presented a disciplinary problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in the perpetration of the death of Judith Ann Carter was not the sole robbery committed by this defendant subsequent to his release from prison some three weeks prior to the date of the offense.
>
> As a preliminary matter, the record is replete with evidence to support the judge's finding of aggravating circumstances number two and four. The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered Appellant's disciplinary record as an aggravating circumstance. Even it we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation improper consideration of a non-statutory factor does not render the sentence invalid. . . (emphasis added).

Clearly, Petitioner's assertion that the trial court's order "failed to fully disclose 'the basis for the death sentence,'" is without support in law or in fact.

VI

Lastly, Petitioner resurrects the Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. den. 454 U.S. 1000 (1981) issue claiming that the Florida Supreme Court violated his rights because of the court's "systematic ex parte solicitation and collection of nonrecord material." This issue has been before this Court on a number of occasions and each time certiorari has been denied.

More recently this Court in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. den., 104 S.Ct. 201 (1983) denied review where this claim was at the very heart of the petition for writ of certiorari.

The Eleventh Circuit in following its earlier en banc decision in Ford v. Strickland, supra, held herein:

> [8] As one of the petitioners in Brown v. Wainwright, 392 So.2d 1327 (Fla.) cert. den., 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), Shriner unsuccessfully attacked the constitutionality of the Florida Supreme Court's alleged use of nonrecord information in appeals of capital convictions. Shriner acknowledges he has no proof that the Florida Supreme Court used any nonrecord information in his direct appeal, and asks us to remand to the district court so he can engage in pertinent discovery. This point is controlled by Ford v. Strickland 696 F.2d 804 (11th Cir. 1983)(en banc). We specifically rejected the sort of discovery Shriner seeks here.
>
> Shriner v. Wainwright, 715 F.2d at 1456-1457. (emphasis added).

Petitioner's last claim is without merit.

CONCLUSION

Based on the foregoing reasons, Respondent would respectfully urge this Court deny Petitioner's Petition for Writ of Certiorari.

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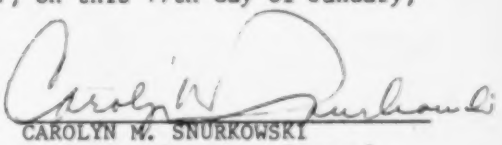
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT was furnished by mail to DANIEL T. O'CONNELL, O'Connell and Hulslander, 33 North Main Street, Gainesville, Florida 32601, on this 17th day of January, 1984.



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APPENDIX

Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), which is analogous to the present disciplinary proceeding, we said:

> This Court deals more severely with cumulative misconduct than with isolated misconduct. *The Florida Bar v. Rubin*, 362 So.2d 12 (Fla.1978). In view of Vernell's prior breaches of professional discipline and his cumulative misconduct in the present case, we hold that a suspension is appropriate. *See The Florida Bar v. Solomon*, 338 So.2d 818 (Fla.1976).

374 So.2d at 476.

[2] We likewise find under the circumstances of the case before us, a six-month suspension with proof of rehabilitation is warranted by Greenspahn's cumulative misconduct and prior disciplinary record.

Accordingly, we hereby suspend Melvyn Greenspahn from the practice of law for a period of six months, effective June 16, 1980. Greenspahn is further directed to pay the costs of these proceedings in the amount of $1,107.00.

It is so ordered.

ENGLAND, C. J., and OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion, with which ADKINS, J., concurs.

BOYD, Justice, concurring in part and dissenting in part.

I would favor the recommendation of the referee providing for a three-month suspension with automatic reinstatement together with payment of costs.

ADKINS, J., concurs.

Carl Elson SHRINER, Appellant,

v.

STATE of Florida, Appellee.

No. 51749.

Supreme Court of Florida.

May 22, 1980.

Rehearing Denied Aug. 27, 1980.

Defendant was convicted before the Circuit Court, Alachua County, R. A. Green, Jr., J., of murder in the first degree and sentenced to death, and he appealed. The Supreme Court held that: (1) sketches attached to police be-on-lookout bulletin bore striking resemblance to defendant, thus furnishing deputy sheriff with reasonable grounds to believe that defendant had committed robberies and to arrest defendant; (2) review of record supported conclusions that when defendant indicated during questioning that he wanted to terminate questioning, he wanted to terminate questioning only insofar as it related to other robbery about which defendant was being questioned, and that assistant state attorney respected defendant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas; (3) interrogation of defendant was thus properly continued and defendant's confession after further questioning to murder for which he was prosecuted in this case was properly admitted at trial; (4) evidence of hotel robbery placed murder weapon in hands of defendant within 90 minutes of victim's murder and thus was clearly probative of murderer's identity and admissible to prove identity; (5) evidence of descriptive account of electrocution would not have aided judge or jury in making determination of whether to impose sentence of death on defendant and thus exclusion of such evidence was not error; (6) record supported judge's findings of two aggravating circumstances and no mitigating circumstances; and (7) possible improper consideration of nonstatutory aggravating circumstance did not render sentence invalid.

Affirmed.

1. Arrest ⇐63.4(2)

Law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that person arrested has committed felony; facts constituting probable cause need not meet standard of conclusiveness and probability required of circumstantial facts upon which conviction must be based.

2. Arrest ⇐63.4(12)

Where sketches attached to police be-on-lookout bulletin bore striking resemblance to defendant, deputy sheriff had reasonable cause to believe that defendant had committed robberies, and thus to arrest defendant.

3. Criminal Law ⇐412.2(3)

If law enforcement officers fail to give specified *Miranda* warnings before interrogation or fail to follow *Miranda* guidelines during interrogation, statement thus derived may be suppressed, even though otherwise wholly voluntary.

4. Criminal Law ⇐414

Review of testimony of assistant state attorney who questioned defendant and absence of rebuttal evidence to contrary support conclusions that when defendant indicated during questioning that he wanted to terminate questioning, he wanted to terminate questioning only insofar as it related to other robbery about which defendant was being questioned, and that assistant state attorney respected defendant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas.

5. Criminal Law ⇐412.1(4)

Supreme Court does not approve of any practice by which suspect's express desire to remain silent as to some specific activity is aborted by subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss.

6. Criminal Law ⇐1158(4)

Where record was bare of any perfidious police practices in obtaining defendant's confession and considering lack of contradictory evidence in defendant's testimony at motion to suppress, Supreme Court would not overturn trial judge's finding of voluntariness of defendant's confession.

7. Criminal Law ⇐517.2(1)

Where assistant state attorney who questioned defendant respected defendant's partial exercise of his *Miranda* privilege, as to other robbery about which defendant was being questioned, and restricted further questioning to other areas, interrogation was properly continued, and thus defendant's confession after further questioning to murder for which he was being prosecuted was properly admitted at trial.

8. Criminal Law ⇐369.1, 371(1, 12), 372(1)

Evidence of other crimes is inadmissible if offered solely for purpose of showing bad character or propensity; however, evidence of other crimes is admissible if it casts light of character of act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or system or general pattern of criminality so that evidence of such other crimes would have relevant or material bearing upon some essential aspect of offense then being tried.

9. Criminal Law ⇐369.2(1)

Relevancy is test for admission of evidence of other crimes; if proffered evidence is relevant for any purpose other than to show bad character or propensity, it should be admitted.

10. Criminal Law ⇐369.15

Where police found .38-caliber gun and cartridges in defendant's residence, ballistics expert identified such gun as murder weapon, 90 minutes after murder hotel was robbed, and hotel clerk identified defendant as culprit and testified that gun used in robbery closely resembled murder weapon, evidence of hotel robbery, if believed by jury, placed murder weapon in hands of defendant within 90 minutes of victim's murder, and thus was clearly probative of murderer's identity and admissible to prove identity.

11. Criminal Law ⇐986.2(1)

While in making determination whether to impose sentence of death, advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in statute, such evidence must be relevant to sentencing inquiry. West's F.S.A. § 921.141(6).

12. Criminal Law ⇐986.2(3)

Evidence of descriptive account of electrocution would not have aided jury or judge in their efforts to determine whether sentence of death should have been imposed on defendant and thus exclusion of such evidence was not error. West's F.S.A. § 921.141.

13. Criminal Law ⇐986.2(1)

Record supported judge's findings of two aggravating circumstances and no mitigating circumstances in making determination as to whether sentence of death should have been imposed on defendant. West's F.S.A. § 921.141(5)(b, d), (6).

14. Criminal Law ⇐1177

Even if judge considered defendant's disciplinary record as aggravating circumstance in determining whether to impose sentence of death on defendant, such error was harmless, since there were two valid aggravating circumstances counterbalanced by no mitigating circumstances, and thus death was presumed to be proper sentence and possible improper consideration of nonstatutory factor did not render such sentence invalid. West's F.S.A. § 921.141(5)(b, d).

Daniel T. O'Connell of O'Connell & Hulslander, Gainesville, for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Carl Elson Shriner, was convicted of one count of murder in the first degree. The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this Court pursuant to article V, section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.[1]

The following facts came to light at trial. At approximately 1:30 a. m. on Friday, October 22, 1977, two young women entered a Gainesville convenience store (Majik Market). Two other persons were in the store at that time, the store clerk, Judith Carter, and a male customer. The women made their purchases ahead of the male customer and departed. The man was in his mid-twenties, of medium height, slender; he had a receding hairline, medium to dark brown collar-length hair, dark eyes, a mustache and a three-to-four-day-old beard.

At 6:15 a. m. the same morning, James Grills went into the Majik Market and discovered the dead body of Judith Carter. He summoned police who arrived at about 6:30 a. m. Gainesville police investigator Mason photographed the scene and recovered three projectiles from the store. Associate district medical examiner Clark later recovered two projectiles from the body.

Alachua County deputy sheriff Denson went on duty Saturday at 3:30 p. m., October 23, 1976, and received a be-on-lookout bulletin (BOLO) with a written description and two composite sketches attached. The description and sketches were based in part on information obtained from the two young women at the Majik Market and on an eyewitness account of an armed robbery which took place early Friday morning at an 8 Days Inn. At 4:00 p. m. that Saturday, deputy Denson stopped opposite a car at a stop sign. The passenger in the car matched the description in the BOLO. Denson stopped the car, advised the passenger of his *Miranda*[2] rights and asked him

1. References to specific pages in the record will be designated as follows: record on appeal, R; supplemental record on appeal, SR; Trial transcript, TT; red-bound transcript of 2/3/77 hearing, TH.

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

some questions. After learning that the passenger had recently been released from prison, Denson took him into custody. The passenger was Carl Shriner.

Upon arrival at the Alachua County sheriff headquarters, detectives readvised appellant of his *Miranda* rights. Appellant signed in four separate places a form constituting an acknowledgment of understanding of *Miranda* rights, a waiver of the right to have an attorney present during questioning, a consent to be interviewed and a consent to make a statement. Shriner gave his local address as 1223 Northeast Eighteenth Avenue, where he and Carol Griffis lived at the home of John and Nancy Rapp. John Rapp was the driver of the car in which appellant was apprehended. Shriner had an Arizona driver's license bearing the name Carl Elson Shriner and the address 514 W. Buist, Phoenix, Arizona, and $338 in his wallet.

A gunman robbed the 8 Days Inn in Gainesville at about 3:00 a. m. Friday, October 22, 1976,[3] under the following circumstances. While waiting for the security guard to leave the immediate area, a man asked the clerk for a room and filled out a guest registration form. He robbed the clerk and took the form with him, but not before the clerk had removed two of the five copies. It was signed "Rob E. Williams, 514 W. Buist, Phoenix, Ariz." The motel clerk identified appellant as the culprit in a photo lineup and at trial.[4]

At the sheriff's office appellant signed a written consent to search the portion of the Rapp residence occupied by him. After John and Nancy Rapp consented in writing to a search of the remainder of their home, the police discovered a Smith and Wesson .38 caliber revolver hidden in a chair in the Rapp children's living room. FBI firearms identification expert Bollenbach took possession of the gun and the five projectiles found in the Majik Market and determined conclusively that the projectiles were fired from that gun.[5]

3. TT 641.

4. TT 651, 655.

5. TT 636.

Appellant was taken to the Gainesville Police Department at 7:30 p. m., Saturday, October 23, 1976. He signed a waiver and consent form after being readvised of his *Miranda* rights. Numerous law enforcement officers and an assistant state attorney participated in the ensuing interrogation, which continued from 9:00 p. m. until 2:45 a. m. the following morning. Appellant first offered to Sergeant Blitch a number of inconsistent accounts of his knowledge of the murder and confessed only to the 8 Days Inn robbery. At approximately 1:00 a. m. Sunday, October 24, 1976, during questioning by assistant state attorney Nilon and with Blitch out of the room, Shriner made some equivocal statements evincing an apparent desire to terminate questioning about the 8 Days Inn robbery.[6] Nilon proceeded to other subjects and the interrogation continued. At 2:00 a. m., with Sergeant Blitch present, appellant confessed to the murder of Judith Carter.

[1, 2] Appellant presents a plethora of issues for our consideration, several of which do not merit discussion. His first colorable contention is that his arrest was illegal because of a lack of probable cause. We disagree. A law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that the person arrested has committed a felony. *State v. Outten*, 206 So.2d 392, 397 (Fla.1968). The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. *Id.* Here, the sketches attached to the police BOLO bore a striking resemblance to appellant, thus furnishing deputy Denson with reasonable grounds to believe that appellant had committed the robberies.

[3] Of considerably greater difficulty is whether, although otherwise voluntary, Shriner's confession must be suppressed be-

6. The facts surrounding this episode will be fully explored later in this opinion.

cause of his claim that the police persisted in questioning him after he indicated an unwillingness to answer questions on a particular subject. Appellant relies upon the following language in *Miranda v. Arizona*, 384 U.S. 436, 473–74, 86 S.Ct. 1602, 1627–1628, 16 L.Ed.2d 694:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. [Footnote omitted.]

Miranda required exclusion of any statements stemming from custodial interrogation unless the prosecution demonstrated compliance with its specific prophylactic safeguards.[7] If law enforcement officers fail to give the specified warnings before interrogation or fail to follow the *Miranda* guidelines during interrogation, the statement thus derived may be suppressed, even though otherwise "wholly voluntary." *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

In *Michigan v. Mosley*, police questioning was held proper even though the accused had earlier indicated his desire to remain silent. The Supreme Court rejected a strict rule which would totally preclude all further custodial interrogation.[8] At the same time it observed that to construe *Miranda* to require only a pause in questioning, with a resumption of interrogation after only a momentary respite, would effectively undermine the will of the accused:

> Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . ." 384 U.S., at 479, 86 S.Ct. at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474, 86 S.Ct. at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 102–04, 96 S.Ct. at 326 (Footnotes omitted).

Turning to the facts here, it appears that during interrogation by assistant state attorney James Nilon, Shriner indicated a desire to stop talking about the 8 Days Inn robbery. At the hearing on the motion to suppress Nilon described the episode in this way:

Direction Examination:

Q. During any of that period of time that you were in his presence did he ever ask to have an attorney present?

A. No, sir, he did not.

7. *United States v. Charlton*, 565 F.2d 86, 89 (6th Cir. 1977), *cert. denied*, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978).

8. *Id.*

Q. Did he ever ask to stop talking or remain silent?

A. Yes, to a certain extent. What he did, in the first conversation that I had with him after Investigator Blitch had left the room, particularly in reference to the 8 Days Inn robbery, he told me certain things that had happened in the 8 Days Inn robbery and when I asked him particularly about the gun that he used in the 8 Days Inn robbery he said to me something to the effect, "Well, right now it's like I'm crazy. It's like I'm nuts." I said, "Well, Mr. Shriner . . ." I don't remember what I said, but I said, "It's not like you mean you are insane." He said, "No." I said, "You mean you don't want to answer any more questions?" And he said, "Yes." I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything.

TH 100–101.

Cross-Examination:

Q. All right. Let me go back to one of the statements that Mr. Shriner is giving—and it was kind of at the end of Mr. Hebert's direct examination—you said that during one of the times you were talking to Mr. Shriner concerning the weapon or the gun, he made the statement to you something about, "I'm crazy" or "Stop. I'm crazy."

A. Yes, sir.

Q. Kind of vague. We are not sure as to the terminology that was used. The word crazy was used, though.

A. Crazy or nuts. It's like I'm crazy or nuts." And I interpreted that to mean, "It's like I'm not really nuts, but for your sake and, you know, in answering these questions, further questions, it's like I'm nuts to you."

Q. Was he saying he was just getting confused or tired?

A. My impression was that he was saying, like, from now on out as far as concerning the gun and specifics of the 8 Days Inn robbery, it was like he was insane, that, you know, the answers would be like a crazy man. I got the impression he was saying, "Don't bother asking me any more questions about that."

Q. I believe you said on direct examination—did he say, "I don't want to answer any more questions"?

A. He never told me specifically like, "I don't want to answer any more questions," that I can remember.

Q. Did you get the impression he didn't want to answer any more questions?

A. About that part of the incident, yes, about the 8 Days Inn and where he got the gun and things of that nature and any more specifics, yes, but then we sat there for a minute or two and I asked him some other questions. I think it was about his personal . . .

Q. About his family and personal things.

A. Yes, and he just answered and we started another conversation and he had no problem.

TH 107–108.

At trial Mr. Nilon offered this account:

Cross-Examination:

Q. At the point in time that you are talking to him now concerning the Eight Days Inn, I believe there was a little incident that took place, and you are talking to Mr. Shriner, and I believe that Mr. Shriner seemed to indicate to you that he did not want to talk, he was having problems. My understanding is did he use the words "I am crazy" or "I am having problems". Do you remember the thing that I am talking about?

A. Yes, I do.

Q. Okay. There was some problem at this point in time, was there not, in the interview room, that existed between Mr. Shriner and yourself as to this interrogation?

A. I don't know what you mean by a problem. There was a point in time that he made some of the statement that you are talking about.

Q. Can you be more specific about that, please?

A. Yes, I can. I had gotten some information from one of the investigators, and I can't tell you which one because there were a number of them, prior to going into the room concerning a piece of paper, I think it was a registration that the person who had committed the robbery had signed before he or as he was pulling the robbery giving an Arizona address. I started questioning Mr. Shriner about signing the registration and did he sign his address or his parents' address, and he, I don't want to say smile, but he had kind of a smirk or a grin on his face and said that "I am crazy." I said, "Do you mean by that that you are actually, you know, out of your mind or crazy?" And I don't remember whether he answered that or not.

I said, "Well you mean you don't want to answer any more questions about that?" And he said, "Yeah."

Q. Okay. But there was some problem at this point in time, he did not want to talk about it?

MR. HEBERT [state attorney]: The State objects, Your Honor. The words speak for themselves. What counsel calls a problem, the witness has already said that he doesn't know what that means but he is telling what happened.

MR. KEARNS [defense counsel]: I will rephrase the question, Your Honor.

THE COURT: The objection is moot by the question being withdrawn.

BY MR. KEARNS:

Q. He did not want to talk about that particular area, did he?

A. No, he did not.

Q. Now, based upon that response, did you inquire as to whether or not he wished to continue?

A. No, sir. At that point in time there was about a minute or two lull or lapse and that is when I started talking about personal things.

Q. Okay. Then you started going on about this personal family things?

A. Yes. At that point in time, during those conversations, I really terminated conversations about any offenses.

TT 720–722.

Redirect Examination:

Q. Now, you mentioned that he mentioned to you that he didn't want to talk about it, he gave you an impression that he didn't want to talk about the specifics of the folio. Did he have any objections about going on and talking about other things?

A. Specific—I am sorry, I didn't understand.

Q. All right. Mr. Kearns talked about the thing called problems sometime—

A. Yes.

Q. —where the defendant said or you asked him about the folio, signing it, and he said, "I am nuts," and you said, "You just don't want to talk about it any more." You didn't talk to him any more about the folio; is that correct?

A. No, I dropped that subject.

Q. Okay. Did he have any problem talking about anything else?

A. No, sir.

Q. Did he ever say that he didn't want to talk about anything else?

A. No, sir.

Q. Did he freely and voluntarily answer other questions that you asked him?

A. Yes, sir. As I stated before, there was about a minute or two lull period where we just sat there and I said—well, I might have started something like, "Carl, where are you from?" And then we started about personal matters that I have already testified to.

Q. All right. Now, during that time when he was making the admissions of guilt to you, "I shot her, why I shot her," did he ever stop or tell you that he wanted to stop talking about it?

A. No, sir.

Q. Or that he wanted a lawyer?

A. No, sir.

TT 727–28.

Appellant testified in his own behalf at the motion to suppress but made no mention of any desire to terminate questioning.

[4–7] We are satisfied that, based on Mr. Nilon's testimony and the absence of rebuttal evidence to the contrary, the trial judge correctly concluded that appellant wanted to terminate questioning only insofar as it related to the 8 Days Inn robbery. We are similarly satisfied that Mr. Nilon respected appellant's partial exercise of his *Miranda* privilege and restricted further questioning to other areas. Given this posture, the police did not run afoul of *Miranda* and *Mosley* by continuing the interrogation:

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject-matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.[9]

United States v. Vasquez, 476 F.2d 730, 732–33 (5th Cir. 1973); *accord*, *Smith v. United States*, 505 F.2d 824 (6th Cir. 1974); *United States v. Matthews*, 417 F.Supp. 813 (E.D.Pa.), *aff'd.*, 547 F.2d 1165 (3d Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S.Ct. 1148, 51 L.Ed.2d 565 (1977).

Hence, appellant's confession was properly admitted at trial.

[8, 9] Appellant next asserts error in the admission of evidence relating to the 8 Days Inn robbery. He properly cites *Williams v. State*, 117 So.2d 473 (Fla.1960), for the proposition that evidence of other crimes is inadmissible if offered solely for the purpose of showing bad character or propensity. However, *Williams* does permit evidence of other crimes

> if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of such other crimes would have a relevant or material bearing upon some essential aspect of the offense then being tried.

Ashley v. State, 265 So.2d 685, 693 (Fla. 1972).

Relevancy is the test; if the proffered evidence is relevant for any purpose other than to show bad character or propensity, it should be admitted. *Id.*

[10] We concur in the trial judge's ruling that evidence of the 8 Days Inn robbery was admissible to prove identity. The following facts adduced at trial make apparent the relevancy of this evidence: (1) police found a .38 caliber gun and cartridges

9. We also concur with the Circuit Court's footnote # 2 to the above statement, 476 F.2d at 733:

> We certainly do not intimate approval of any practice by which a suspect's express desire to remain silent as to some specific activity is aborted by the subterfuge of questioning which is designed or intended to indirectly gain information about those matters which he has indicated he wishes not to discuss. However, this record is bare of any perfidious police practices. And considering the lack of contradictory evidence in Shriner's testimony at the motion to suppress, we would be irresponsible to overturn the trial judge's finding of voluntariness. *See Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

in appellant's residence; [10] (2) ballistics expert Bollenbach identified the gun found in appellant's residence as the murder weapon; [11] (3) at 3:00 a. m., only ninety minutes after Judith Carter's murder, a man robbed the 8 Days Inn. The hotel clerk identified appellant as the culprit and testified that the gun used in the robbery closely resembled the murder weapon.[12] Thus, the evidence of the 8 Days Inn robbery, if believed by the jury, *places the murder weapon in the hands of appellant within ninety minutes of Judith Carter's demise.* Such evidence is clearly probative of the murderer's identity.

[11, 12] The remaining issues involve the sentencing phase of the trial. Appellant's constitutional attack on the death penalty has been thoroughly canvassed in prior decisions and found groundless. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Equally meritless is the contention that it was error to exclude the testimony of a priest who had witnessed an execution by electrocution. While it is settled that an advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in section 921.141(6), Florida Statutes (1977),[13] the evidence must be relevant to the sentencing inquiry. We do not believe that a descriptive account of an electrocution would aid the jury or judge in their effort to apply section 921.141 fairly and correctly. Indeed, such evidence would more likely serve to distort and obfuscate the sentencing process.

Appellant contends finally that his death sentence is fatally defective because the judge considered nonstatutory aggravating circumstances. The relevant portions of the judge's findings are as follows:

The question occurs as to whether death or life imprisonment should be the verdict of this Court. Using the statutory guidelines of mitigating circumstances as opposed to aggravating circumstances, the Court finds under aggravating circumstances the following:

1. Whether the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted. This case does not fit this guideline.

2. Whether the Defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person.

The Defendant CARL ELSON SHRINER was convicted of the offense of Armed Robbery in Dade County in 1972. He served a five-year sentence in the Department of Offender Rehabilitation for this act.

3. Whether in committing the murder for which he has just been convicted, the Defendant knowingly created a great risk of death to many persons. This guideline is not applicable to this case.

4. Whether the murder for which the Defendant was convicted was committed while he was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive bomb or device.

The evidence shows in this case that the Defendant killed Judith Ann Carter while perpetrating robbery.

The following are statutory mitigating circumstances which have been considered:

1. Whether the Defendant has no significant history of prior criminal activity.

10. TT 611.

11. TT 636.

12. TT 641-56.

13. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Proffitt v. Florida*, *supra*; *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

2. Whether the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.

3. Whether the victim was a participant in the Defendant's conduct or consented to the acts.

4. Whether the Defendant was an accomplice in the murder committed by another person and the Defendant's participation was relatively minor.

5. Whether the Defendant acted under extreme duress or under the substantial domination of another person.

6. Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the Defendant at the time of the crime.

The Court finds, with the possible exception of No. 6 above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the presentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this Defendant prior to trial, he has been diagnosed as a "sociopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacity is diminished thereby.

The Court finds that the aggravating circumstances far outweigh the mitigating circumstances.

In addition, an examination of the presentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the Defendant prior to sentencing, indicates that during the Defendant's incarceration at the Department of Offender Rehabilitation, he has presented a discipline problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in perpetration of the death of Judith Ann Carter was not the sole robbery committed by this Defendant subsequent to his release from prison some three weeks prior to the date of the offense.

[13, 14] As a preliminary matter, the record is replete with evidence to support the judge's finding of aggravating circumstances numbered two and four.[14] The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation,[15] improper consideration of a nonstatutory factor does not render the sentence invalid:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors *where there are no mitigating circumstances*. The absence of mitigating circumstances becomes important, because, so long as there are *some* statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute.

Elledge v. State, 346 So.2d 998, 1002–03 (Fla.1977) (emphasis in original).

Accordingly, the judgment of guilt and the sentence of death are affirmed.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

14. § 921.141(5)(b) and (d), Fla.Stat. (1977).

15. "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances . . . ." *State v. Dixon*, 283 So.2d at 9.